December 2005

MJI Publication Updates

Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

December 2005

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.13 The Exclusionary Rule and Good Faith Exception

Insert the following text after the October 2005 update to page 25:

Where the good-faith exception does not apply to evidence seized pursuant to an invalid search warrant and the evidence falls within a law enforcement officer's "zone of primary interest," that evidence is not admissible in a subsequent criminal proceeding against the same defendant. *People v McGee*, ___ Mich App ___, ___ (2005), citing *United States v Janis*, 428 US 433, 445–460 (1976), and *Elkins v United States*, 364 US 206, 223 (1960).

In *McGee*, evidence was seized from the defendant in 1992 pursuant to a search warrant based on "deliberately false statements made under oath[.]" *McGee, supra* at ___ n 5. Because of the deliberate falsity, the *McGee* Court concluded that the officers executing the warrant could not have reasonably relied on the warrant's validity so that the good-faith exception did not apply. The prosecution used this same evidence to convict the defendant in a 1998 criminal proceeding involving different circumstances. *McGee, supra* at ___.

The Court compared the *McGee* case to the circumstances in *Elkins, supra*, where the United States Supreme Court ruled that evidence unlawfully seized on a prior occasion could not be admitted against a defendant in a subsequent criminal prosecution:

> "*Elkins* could be analogized to the instant case—the search conducted by officers from one police agency was determined to have violated defendant's immunity from searches and seizures and, thus, was inadmissible in a subsequent trial." *McGee, supra* at ___.

Again referring to *Elkins, supra,* and *Janis, supra* (same outcome as *Elkins* but involving the exclusion of illegally obtained evidence from a subsequent civil suit against a defendant), the *McGee* Court further noted:

"Although much of the cited text is dicta with respect to the instant issue, it indicates that evidence obtained by a law enforcement officer with respect to any criminal proceeding falls within the officer's zone of primary interest. It also appears to suggest that the 1992 evidence should have been excluded. . . . Here, because the evidentiary hearing with respect to the 1992 search indicated that the officer who swore to the affidavit for the warrant provided false statements, the violation was substantial and deliberate, and [the evidence] should have been suppressed." *McGee, supra* at ___ (footnote and citations omitted).

December 2005

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Part A—Commentary on Misdemeanor Arraignments

3.12 Waiver of the Right to Counsel

Add the following text after the August 2005 update to pages 20–21:

By order issued November 9, 2005, the Michigan Supreme Court reversed a Court of Appeals judgment (briefly discussed below) involving a defendant who was denied permission to represent himself at trial. *People v Chaaban (Chaaban I)*, ___ Mich ___ (2005). According to the Michigan Supreme Court, in violation of *Faretta v California*, 422 US 806 (1975), "[t]he trial court erroneously denied defendant's unequivocal request to represent himself[.]" *Chaaban I, supra* at ___.

In *People v Chaaban (Chaaban II)*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2005 (Docket No. 253513), the Court of Appeals concluded that the trial court did not err when it refused to permit the defendant to represent himself at trial. According to the Court of Appeals, it was plain that "defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding [his] competence." *Chaaban II, supra* at ___.

Specifically, the Court of Appeals noted:

> "Defendant Chaaban went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do." *Chaaban II, supra* at ___.

December 2005

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.13 Waiver of Right to Counsel

Add the following case summary after the August 2005 update to page 19:

By order issued November 9, 2005, the Michigan Supreme Court reversed a Court of Appeals judgment (briefly discussed below) involving a defendant who was denied permission to represent himself at trial. *People v Chaaban (Chaaban I)*, ___ Mich ___ (2005). According to the Michigan Supreme Court, in violation of *Faretta v California*, 422 US 806 (1975), "[t]he trial court erroneously denied defendant's unequivocal request to represent himself[.]" *Chaaban I, supra* at ___.

In *People v Chaaban (Chaaban II)*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2005 (Docket No. 253513), the Court of Appeals concluded that the trial court did not err when it refused to permit the defendant to represent himself at trial. According to the Court of Appeals, it was plain that "defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding [his] competence." *Chaaban II, supra* at ___.

Specifically, the Court of Appeals noted:

> "Defendant Chaaban went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do." *Chaaban II, supra* at ___.

December 2005

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following text after the October 2005 update to page 87:

The good-faith exception to the exclusionary rule does not apply to evidence obtained pursuant to a search warrant based on an affiant's admitted and purposeful false statements. *People v McGee*, ___ Mich App ___, ___ (2005).

In *McGee*, the defendant argued that evidence obtained in 1992 through the execution of an illegal search warrant should not be admissible against him in a 1998 criminal proceeding. *McGee, supra* at ___. Citing *Elkins v United States*, 364 US 206 (1960), and *United States v Janis*, 428 US 433 (1976), the *McGee* Court agreed:

> "Although much of the cited text is dicta with respect to the instant issue, it indicates that evidence obtained by a law enforcement officer with respect to any criminal proceeding falls within the officer's zone of primary interest. It also appears to suggest that the 1992 evidence should have been excluded. . . . Here, because the evidentiary hearing with respect to the 1992 search indicated that the officer who swore to the affidavit for the warrant provided false statements, the violation was substantial and deliberate, and [the evidence] should have been suppressed." *McGee, supra* at ___ (footnote and citations omitted).

Part 2—Individual Motions

6.39 Motion for Severance or Joinder of Multiple Charges Against a Single Defendant

Insert the following text at the bottom of page 94:

See also *People v Girard*, ___ Mich App ___, ___ (2005), where the trial court properly denied the defendant's request to sever the CSC-I charges from the charges of possession of child sexually abusive material. In *Girard*, the evidence showed that the conduct underlying the charges against the defendant was plainly accounted for by the language of MCR 6.120(B)—"offenses are related if they are based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan." Testimony at the defendant's trial established "that defendant used child pornography for stimulation before and during his sexual abuse of the complainant and thus was part of his modus operandi." *Girard, supra* at ___.

December 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part V—Exhibits (MRE Articles IX and X)

2.48 Writings and Documents

B. Admissibility of Other Evidence of Contents—MRE 1004

Insert the new subsection as indicated above after the existing text on page 126:

The "best evidence" requirement is subject to exceptions authorized by other rules of evidence or by statute. MRE 1004 specifically states that

> "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—
>
> * * *
>
> **"(4) Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue."

In *People v Girard*, ___ Mich App ___, ___ (2005), the trial court admitted into evidence sexual images of children found on the defendant's computer. The defendant argued that admission of the images violated MRE 1002—the "best evidence" rule—because witnesses identified the images only "as being similar to the images they had seen on defendant's computer." However, testimony established that the defendant looked at sexually explicit images on his computer before or during the sexual conduct with the complainant. *Girard, supra* at ___. According to the Court, this testimony about the computer images explained the circumstances under which the sexual assaults occurred, and therefore, with regard to the CSC-I charges against the

defendant, the images of child pornography found on the defendant's computer were a collateral matter unrelated to a controlling issue. Because of this, other evidence of the contents of the images—testimony from witnesses who watched the defendant look at the images or to whom the defendant sent the images via email—was properly admitted against the defendant pursuant to MRE 1004's exception to the "best evidence" rule. *Girard, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text after the August 2005 update to page 383:

By order issued November 9, 2005, the Michigan Supreme Court reversed a Court of Appeals judgment (briefly discussed below) involving a defendant who was denied permission to represent himself at trial. *People v Chaaban (Chaaban I)*, ___ Mich ___ (2005). According to the Michigan Supreme Court, in violation of *Faretta v California*, 422 US 806 (1975), "[t]he trial court erroneously denied defendant's unequivocal request to represent himself[.]" *Chaaban I, supra* at ___.

In *People v Chaaban (Chaaban II)*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2005 (Docket No. 253513), the Court of Appeals concluded that the trial court did not err when it refused to permit the defendant to represent himself at trial. According to the Court of Appeals, it was plain that "defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding [his] competence." *Chaaban II, supra* at ___.

Specifically, the Court of Appeals noted:

> "Defendant Chaaban went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do." *Chaaban II, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.18 Separate or Joint Trial

A. One Defendant—Multiple Charges

Insert the following text before subsection (B) on page 324:

See also *People v Girard*, ___ Mich App ___, ___ (2005), where the trial court properly denied the defendant's request to sever the CSC-I charges from the charges of possession of child sexually abusive material. In *Girard*, the evidence showed that the conduct underlying the charges against the defendant was plainly accounted for by the language of MCR 6.120(B)—"offenses are related if they are based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan." Testimony at the defendant's trial established "that defendant used child pornography for stimulation before and during his sexual abuse of the complainant and thus was part of his modus operandi." *Girard, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.18 Separate or Joint Trial

C. Standard of Review

On page 326, add the following text to the only paragraph in this section:

However, whether the charges are related is a question of law that is reviewed de novo. *People v Girard,* ___ Mich App ___, ___ (2005), citing *People v Tobey,* 401 Mich 141, 153 (1977). MCR 6.120(B) is a codification of the Supreme Court's decision in *Tobey. People v Abraham,* 256 Mich App 265, 271 (2003).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation is Found?

1. Good-Faith Exception

Insert the following text after the October 2005 update to page 348:

The good-faith exception to the exclusionary rule does not apply to evidence obtained pursuant to a search warrant based on an affiant's admitted and purposeful false statements. *People v McGee*, ___ Mich App ___, ___ (2005).

In *McGee*, the defendant argued that evidence obtained in 1992 through the execution of an illegal search warrant should not be admissible against him in a 1998 criminal proceeding. *McGee, supra* at ___. Citing *Elkins v United States*, 364 US 206 (1960), and *United States v Janis*, 428 US 433 (1976), the *McGee* Court agreed:

> "Although much of the cited text is dicta with respect to the instant issue, it indicates that evidence obtained by a law enforcement officer with respect to any criminal proceeding falls within the officer's zone of primary interest. It also appears to suggest that the 1992 evidence should have been excluded. . . . Here, because the evidentiary hearing with respect to the 1992 search indicated that the officer who swore to the affidavit for the warrant provided false statements, the violation was substantial and deliberate, and [the evidence] should have been suppressed." *McGee, supra* at ___ (footnote and citations omitted).

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text after the May 2005 update to page 433:

Where "the only difference [] between the possession with intent to deliver offenses is the amount of the illegal substance, it [is] not possible to commit the greater offense without committing the lesser offense." *People v McGee*, ___ Mich App ___, ___ (2005). However, the *McGee* Court noted that this does not necessarily mean that a trial court must give instructions for all possible amounts if the defendant so requests.

In *McGee*, the trial court instructed the jury on two different possession with intent to deliver offenses—possession with intent to deliver 225 to 650 grams of cocaine and possession with intent to deliver more than 650 grams of cocaine. *McGee, supra* at ___. The defendant argued that the trial court should instruct the jury on the necessarily included lesser offense of possession with intent to deliver 50 to 225 grams of cocaine. The Court disagreed and emphasized the controlling rule as expressed in *People v Cornell*, 466 Mich 335, 352 (2002):

> "[A]n instruction on the lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute." *McGee, supra* at ___.

The defendant argued that the lesser instruction was appropriate because of all the cocaine discovered during the search of the house and garage, the jury could have found him guilty of possessing only the amount of cocaine contained in the pocket of the defendant's coat, which was inside the house. Answered the *McGee* Court:

> "[D]efendant did not argue or present evidence that he possessed a lesser amount. Therefore, a rational view of the evidence does not support defendant's claim that the amount of cocaine possessed was in dispute. *Cornell, supra*." *McGee, supra* at ___ (footnote omitted).

December 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

A. Statutory Authority

3. Possession of Child Sexually Abusive Material

Insert the following text before subsection (B) in the March 2003 update to pages 132–133:

Determining whether images stored in temporary Internet or deleted files on the defendant's computer could establish his knowing possession of child sexually abusive material was unnecessary where the complainant and the defendant's wife testified that the "defendant look[ed] at images of adolescents on his computer screen for extended periods of time, including during the course of engaging in sexual acts [and] defendant's friend testified that defendant had emailed him pictures of nude children." *People v Girard*, ___ Mich App ___, ___ (2005).

CHAPTER 3

Other Related Offenses

3.11 Dissemination of Sexually Explicit Matter to Minors

A. Statutory Authority—Disseminating and Exhibiting

2. Statutory Exceptions

Insert the following text immediately before subsection (B) in the January 2004 update to page 144:

Effective December 1, 2005, by 2005 PA 108, the statutory provisions concerning sexually explicit matter, MCL 722.671 *et seq.*, are specifically contained in Part I, to which the title "Sexually Explicit Matter" was added.*

*Also effective December 1, 2005, 2005 PA 108 added a new Part II, "Ultra-Violent Explicit Video Games," MCL 722.685 *et seq*.

2005 PA 108 also added a new section, MCL 722.682a, containing exceptions to the statutory provisions found in Part I, Sexually Explicit Matter. The new section, effective December 1, 2005, states:

> "Sec. 12a. This part does not apply to any of the following:
>
> > "(a) A medium of communication to the extent regulated by the federal communications commission.
> >
> > "(b) An internet service provider or computer network service provider that is not selling the sexually explicit matter being communicated but that provides the medium for communication of the matter. As used in this section, 'internet service provider' means a person who provides a service that enables users to access content, information, electronic mail, or other services offered over the internet or a computer network.
> >
> > "(c) A person providing a subscription multichannel video service under terms of service that require the subscriber to meet both of the following conditions:
> >
> > > "(*i*) The subscriber is not less than 18 years of age at the time of the subscription.
> > >
> > > "(*ii*) The subscriber proves that he or she is not less than 18 years of age through the use of a credit card, through the presentation of government-issued identification, or by other reasonable means of verifying the subscriber's age."